STATE OF NORTH CAROLINA	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
COUNTY OF WAKE	**09 EDC 4193**

Student, by *Parents*, Petitioner, v. WAKE COUNTY PUBLIC SCHOOLS BOARD OF EDUCATION, Respondent.	)	**ORDER**

This matter came on for hearing on Respondent's Motion to Dismiss and for Partial Summary Judgment, and on Petitioners' Motion for Partial Summary Judgment. The Respondent was represented by Christine T. Scheef and Eva DuBuisson. The Petitioners were represented by Stephon J. Bowens and Saleisha Williams. After reviewing the record proper including the Respondent's and Petitioners' Motions, and all other items submitted by both the Respondent and the Petitioners, and after hearing argument from the Respondent's counsels and the Petitioners' counsel, the Undersigned hereby makes the following rulings based on the standards of review for Motions for Summary Judgment.

Dismissal-Standard of Review

When a court reviews the sufficiency of a complaint, before the reception of any evidence, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. *Scheuer v. Rhodes,* 416 U.S. 232, 94 S.Ct. 1683 (1974) When ruling on a motion to dismiss, the court must determine "whether, as a matter of law, the allegations of the complaint ... are sufficient to state a claim upon which relief may be granted." *Harris v. NCNB,* 85 N.C.App. 669, 355 S.E.2d 838 (1987). In ruling on a motion to dismiss, the court must treat the allegations in the complaint as true. See *Hyde v. Abbott Lab., Inc.,* 123 N.C.App. 572, 473 S.E.2d 680 (1996). The court must construe the complaint liberally (*Branch Banking & Trust Co. v. Lighthouse Fin. Corp.,* 2005 NCBC 3 (N.C.Super.Ct. July 13, 2005)) and in the light most favorable to the pleader (the Petitioner). See *Scheuer*

Dismissal is appropriate when the face of the complaint clearly reveals the existence of a meritorious affirmative defense. *See Brooks v. City of Winston-Salem,* 85 F.3d 178 (4th Cir. 1996).

When reviewing a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), a trial court may consider and weigh matters outside the pleadings. *See Department of Transportation v. Blue,* 147 N.C. App. 596, 556 S.E.2d 609 (2001).

Summary Judgment-Standard of Review

Summary judgment is designed to eliminate formal trials where material facts are not disputed and only questions of law are involved. Since summary judgment is a drastic remedy, it should be used cautiously, with due regard to its purposes and a cautious observance of its requirements and never as a tool to deprive any party of a trial when genuinely disputed factual issues exist. *See Brown v. Greene*, 98 N.C.App. 377, 390 S.E.2d 695 (1990). The standard of review is whether there is a genuine issue of material fact and whether the movant is entitled to judgment as a matter of law. *See Kessing v. National Mortgage Corp*., 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). Summary judgment is an extreme remedy and should be awarded only where the truth is quite clear. *See Lee v. Shor*, 10 N.C.App. 231, 233, 178 S.E.2d 101, 103 (1970). To entitle one to summary judgment, the movant must conclusively establish a legal bar to the nonmovant's claim or complete defense to that claim. *See Virginia Elec. and Power Co. v. Tillett*, 80 N.C.App. 383, 385, 343 S.E.2d 188, 190-91, *cert denied*, 317 N.C. 715, 347 S.E.2d 457 (1986).

The burden of establishing a lack of any triable issue resides with the movant. *See Pembee Mfg. Corp. v. Cape Fear Constr. Co*. 313 N.C. 488, 329 S.E.2d 350 (1985). The trial court must determine if there is a triable material issue of fact, viewing all evidence presented in the light most favorable to the nonmoving party. *See Waddle v. Sparks*, 100 N.C. App. 129, 394 S.E.2d 683, (1990), *aff'd in part and rev'd in part on other grounds*, 331 N.C. 73, 414 S.E.2d 22 (1992). In a hearing on a motion for summary judgment, the nonmovant does not have to automatically make out a prima-facie case, but only has to refute any showing made that his or her case is fatally deficient. *See Riddle v. Nelson*, 84 N.C.App.656, 353 S.E.2d 866 (1987). The slightest doubt as to the (material) facts entitles the nonmovant to a trial. *See Snipes v. Jackson*, 69 N.C.App.64, 316 S.E.2d 657, *disc.review denied*, 312 N.C. 85, 321 S.E.2d 899 (1984). Facts asserted by the party answering a summary judgment motion must be accepted as true. *See Norfolk & Western Railway Co. v. Werner Industries*, 286 N.C. 89, 209 S.E.2d 734 (1974). Further, summary judgment may not be used where conflicting evidence is involved. *See Smith v. Currie*, 40 N.C.App. 739, 253 S.E.2d 645, *cert. denied*, 297 N.C. 612, 257 S.E.2d 219 (1979). Moreover, if there is a question which can be resolved only by the weight of the evidence, summary judgment must be denied. *See City of Thomasville v. Lease-Afex, Inc*., 300 N.C. 651, 268 S.E.2d 190 (1980).

The Motions

Respondent's Motion asserts that the Office of Administrative Hearings lacks subject matter jurisdiction over Petitioners' claims that *Student* was entitled to receive services on his Individualized Education Program during a period when he was home schooled (approximately February 16, 2009 to April 2009) and the same should be dismissed. Respondent further asserts that all claims arising prior to July 13, 2008 should be dismissed, or in the alternative, summary judgment should be granted on the basis of the untimeliness of the filing of the Petition for any and all matters later than July 13, 2008. Lastly Respondent seeks summary judgment regarding all claims for compensatory services for the 2009 summer Extended School Year.

Petitioners seek partial summary judgment with respect to the following: "(1) that respondent has failed to provide education records and/or information consistent with the statutory 45 day requirement, (2) that respondent has failed to provide petitioner special educational services consistent with his individualized education plan ("IEP") and the provision of a free appropriate public education as contemplated by the Individuals with Disabilities Education Act ("IDEA"), and (3) that petitioner has suffered and regressed based upon this denial of a free appropriate public education."

Timeliness

In accordance with 34 CFR 300.507, a due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint, or, if the State has an explicit time limitation for filing a due process complaint, in the time allowed by that State law. In accordance with N.C.G.S. § 115C-109.6., "Notwithstanding any other law, the party shall file a petition under subsection (a) of this section that includes the information required under IDEA and that sets forth an alleged violation that occurred not more than one year before the party knew or reasonably should have known about the alleged action that forms the basis of the petition."

In accordance with N.C.G.S. § 115C-109.6, "The one-year restriction in subsection (b) of this section shall not apply to a parent if the parent was prevented from requesting the hearing due to (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the petition, or (ii) the local educational agency's withholding of information from the parent that was required under State or federal law to be provided to the parent." (*See* also 34 CFR 300.511)

In their Petition and Amended Petition, Petitioners' seek redress for claims when Petitioner *Student* "began his educational career with the Wake County Public School System" in July of 2007. Petitioners set forth credible facts that (for purposes of dismissal and summary judgment must be accepted as true) showed a legitimate belief that Respondent was resolving the issues that occurred beginning in July 2007. Likewise Petitioners presented evidence that the Respondent withheld information up to and including May 2009 required by State and Federal law to be provided to the parent. Petitioners have set forth enough information to fall within one or both exceptions to the one year filing rule. As such Respondent's motion to dismiss and/or grant summary judgment regarding all claims arising prior to July 13, 2008 is denied.

Services from approximately February 16, 2009 to April 2009

Among other claims in the Petition and Amended Petition, Petitioners seek redress for the lack of services from approximately February 16, 2009 to April 2009. The Amended Petition states that "shortly after the February 16, 2009 IEP meeting the (Parents) removed Petitioner from Wake County Public Schools." The Petition goes on to show that *Student* was home schooled "from March of 2009 to April of 2009." However, as stated in Petitioner's Reply to Respondent's Motion for Partial Summary Judgment, and as brought forth in the hearing, "on February 23, 2009, *Student's Mother* re-enrolled *Student* into the WCPSS." With neither parent in attendance in the Motions hearing, the record is unclear as to whether *Student* was home schooled or truant or had a prolonged medical or other reason for his absence. Moreover the record is unclear as to why Petitioners made the above cited statements regarding home schooling and/or failed to cite a February 23 re-enrollment in the Petition or Amended Petition. Petitioners sought to Amend the Amended Petition at the Motions hearing.

In accordance with 34 CFR 300.508, "A party may amend its due process complaint only if (i) The other party consents in writing to the amendment and is given the opportunity to resolve the due process complaint through a meeting held pursuant to § 300.510; or (ii) The hearing officer grants permission, except that the hearing officer may only grant permission to amend at any time not later than five days before the due process hearing begins." Further, "If a party files an amended due process complaint, the timelines for the resolution meeting in §300.510(a) and the time period to resolve in §300.510(b) begin again with the filing of the amended due process complaint."

Respondent would not consent to an amendment and Petitioner was within a five day period (by a few hours) in making the amendment request. The Undersigned denies the request to amend but for reasons other than technically missing the five day requirement, including the length this matter has been at the Office of Administrative Hearings (approximately nine months), the number (approximately 7) of extensions (all for good cause) granted in this case, the fact that the original Petition has already been amended, and lastly, based upon the subject matter of this new request for a second amendment. Further, and of some significance, granting permission to amend would begin again all timelines with the filing of the amended complaint.

The Undersigned dismisses all claims occurring between February 16, 2009 (the date Petitioners removed *Student* from Wake County Public Schools and April 30, 2009 (the date a new IEP meeting was held between *Parent* and WCPSS).

BASED ON the evidence in the record and brought forth during the April 15, 2010 motions hearing, in all other matters regarding Respondent's Motion for Partial Summary Judgment and Petitioners' Motion for Summary Judgment, it appears that multiple material and factual issues are in dispute. Such discrepancies when applied to the standard of review for Summary Judgment (Summary judgment may not be used where conflicting evidence is

involved, and/or if there is a question which can be resolved only by the weight of the evidence, summary judgment must be denied); lead the Undersigned to no other conclusion but that the remainder of Respondent's Motion for Partial Summary Judgment and Petitioners' Motion for Partial Summary Judgment should be and are hereby denied.

NOTICE

The North Carolina Department of Public Instruction has notified the Office of Administrative Hearings that any decision based on dismissal is not subject to appeal to the NC Department of Public Instruction.

Pursuant to the provisions of NORTH CAROLINA GENERAL STATUTES Chapter 150B, Article 4, any party wishing to appeal the decision of dismissal of the Administrative Law Judge may commence such appeal by filing a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. The party seeking review must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Decision and Order. N.C. GEN. STAT. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Pursuant to N.C. GEN. STAT. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal.

In the alternative, any person aggrieved by the findings and decision of matters that were dismissed may institute a civil action in the appropriate district court of the United States as provided in Title 20 of the United States Code, Chapter 33, Subchapter II, Section 1415 (20 USC 1415). Procedures and time frames regarding appeal into the appropriate United States district court are in accordance with the aforementioned Code cite and other applicable federal statutes and regulations. A copy of the filing with the federal district court should be sent to the Exceptional Children Division, North Carolina Department of Public Instruction, Raleigh, North Carolina so that the records of this case can be forwarded to the court.

IT IS SO ORDERED.

This the 16th day of April, 2010.

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Augustus B. Elkins II
Administrative Law Judge